No. 93-1525

SUPREME COURT, U.S.
FILED
SEP 8 1994
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT

Of Counsel:
STEPHEN C. ROGERS
RICHARD G. SLATTERY
NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

KEVIN T. BAINE
Counsel of Record
NICOLE K. SELIGMAN
STEVEN M. FARINA
STEPHEN D. SENCER
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Attorneys for Respondent National Railroad Passenger Corporation (Amtrak)

September 8, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Amtrak's refusal to lease space for the display of a political advertisement in Penn Station constitutes government action subject to challenge under the First Amendment, when the government did not coerce, encourage, or influence Amtrak's action in any way.

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner seeks an order compelling Amtrak to display a 103-foot long political advertisement on an illuminated billboard that dominates the entrance to Penn Station in New York City. (Copies of the proposed ad have been lodged with the Clerk, and the text is reprinted as an appendix to this brief.) Amtrak refused to lease its billboard space to petitioner based on a long-standing policy prohibiting political advertising in Penn Station. The question presented to this Court is whether Amtrak's decision to reject petitioner's political ad should be treated as that of the United States government.

A. Amtrak

1. *Amtrak's Creation As a Nongovernmental Corporation*

Amtrak (the National Railroad Passenger Corporation) was established in 1971 as a for-profit corporation engaged

in the commercial enterprise of offering intercity and commuter rail passenger service. Congress authorized the creation of Amtrak in response to the dramatic decline in intercity rail transportation that had occurred in the decades following World War II. Whereas in 1929 approximately 20,000 passenger trains operated in the United States, by 1970 fewer than 500 remained.[1] Many of the railroads that continued in operation were suffering heavy losses. The total rail passenger deficit for 1969 alone was roughly $200 million.[2] As common carriers, the railroads were bound to continue operating unprofitable lines unless the Interstate Commerce Commission or state regulatory authorities relieved them of that responsibility. By 1970, the railroads were seeking ICC permission to discontinue more than 100 of the remaining intercity passenger lines.[3]

The Rail Passenger Service Act of 1970 ("RPSA"), Pub. L. No. 91-518, 84 Stat. 1328, 45 U.S.C. § 501 *et seq.* (1988 & Supp. IV 1992), was Congress's effort to preserve and revive the failing intercity passenger train industry. "On concluding that a reorganized and restructured rail passenger system could be successful, Congress established the National Railroad Passenger Corporation, a private for-profit corporation that has come to be known as Amtrak." *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985). Congress authorized the creation of Amtrak to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles." H.R. Rep. No. 1580, *reprinted in* 1970 U.S.C.C.A.N. at 4735.

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[1] House Committee on Interstate and Foreign Commerce, Rail Passenger Service Act of 1970, H.R. Rep. No. 1580, 91st Cong., 2d Sess. (1970) (hereinafter cited as "H.R. Rep. No. 1580"), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4736.

[2] *Id.* at 4737.

[3] *Id.* at 4736.

Congress explicitly directed that "[t]he Corporation will not be an agency or establishment of the United States Government." Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970) (current version at 45 U.S.C. § 541). Instead, the statute declared, Amtrak would be a "for profit corporation" subject to the District of Columbia Business Corporation Act. *Id.* Likewise, the House Report accompanying the RPSA twice explained that Amtrak would be a "private, for profit corporation." H.R. Rep. No. 1580, *reprinted in* 1970 U.S.C.C.A.N. at 4739, 4742.

The RPSA authorized Amtrak to enter into standardized contracts with the railroads, known as "Basic Agreements," pursuant to which the railroads would be relieved of their common carrier responsibilities to provide intercity rail passenger service. 45 U.S.C. § 561(a). Those railroads that entered into Basic Agreements agreed to pay Amtrak amounts calculated by reference to their prior losses attributable to intercity passenger service. Payments were made in cash or, at Amtrak's option, by the transfer of rail passenger equipment or the provision of services. *Id.* In return, the railroads received common stock in amounts equivalent in par value to their payments (unless they waived that right in favor of a tax write-off). *Id.*

The railroads' payments to the new corporation totaled $197 million.[4] Congress supplemented that amount with an outright grant to Amtrak of $40 million. Pub. L. No. 91-518, § 601, 84 Stat. 1327, 1338 (1970).

The RPSA directed the Secretary of Transportation to design a route system over which the new corporation would be required to provide intercity rail passenger service. 45 U.S.C. § 521. Aimed at shedding unprofitable and nonessential routes, the resulting "Basic System" elimi-

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[4] G. Hilton, *Amtrak: The National Railroad Passenger Corporation* 16-17 (1980) (hereinafter cited as "Hilton").

nated nearly half the passenger routes then in service.[5] Amtrak began providing rail passenger service on this reduced basis on May 1, 1971.

2. *Amtrak's Acquisition of Rail Lines*

When Amtrak began operations in 1971, its activities were limited to providing administrative functions such as booking reservations, selling tickets, and providing marketing services. Amtrak itself owned no track and operated no trains directly, but instead contracted with other railroads to provide actual rail service.[6] Under these arrangements, in fiscal year 1972 Amtrak earned $163 million in revenues, but incurred $310 million in expenses. JA 680.[7]

The Regional Rail Reorganization Act of 1973 ("3-R Act")[8] and the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")[9] provided Amtrak the opportunity to acquire its own rail lines. Pursuant to this legislation, the United States ultimately paid the bankrupt Penn Central Corporation $2.113 billion (which included interest) for approximately 19,000 miles of rail lines and related property. JA 188-89; E 968-1038. Penn Central conveyed this property to Conrail, a private for-profit freight railroad established pursuant to the 3-R Act. Conrail in turn sold Amtrak 621 miles of rail lines and related property, including Penn Station and most of the Northeast Corridor between Washington and Boston, for $87 million. *See* 45 U.S.C. §§ 716, 791(d)(1); JA

[5] *See* Tobey, *Costs, Benefits, and the Future of Amtrak*, 16 Transp. L.J. 245, 258 & n.60 (1987) (hereinafter cited as "Tobey").

[6] Tobey, *supra* note 5, at 261.

[7] Citations to JA —— are to pages of the joint appendix. Citations to Pet. App. —— are to pages of the appendix to the petition. Citations to C.A. App. —— and E —— are to pages of the joint appendix and exhibit volumes in the court of appeals.

[8] Pub. L. No. 93-236; 45 U.S.C. § 701 *et seq.* (1988).

[9] Pub. L. No. 94-210; 45 U.S.C. § 801 *et seq.* (1988).

407-09; Hilton, *supra* note 4, at 27.[10] Thus, beginning in 1976, Amtrak owned its own tracks and was able to provide service directly instead of through contracting railroads.

From the early 1980's onward, Amtrak has undertaken concentrated efforts to reduce costs, increase productivity, and improve overall competitiveness. With the acquisition of its own trackage and modern, more efficient equipment, Amtrak's efforts have been largely successful. In 1982, Amtrak relied upon federal subsidies to cover 47 percent of operating expenses. That figure had been reduced to 31 percent of operating expenses by 1988, and to only 18 percent of the railroad's operating expenses by 1992.[11]

3. *Amtrak's Current Structure and Operations*

Amtrak's current structure and operations are in most respects like those of other for-profit corporations. Amtrak is chartered under the District of Columbia Business Corporation Act. 45 U.S.C. § 541. Amtrak's corporate governance is dictated by the company's Articles of Incorporation and Bylaws. JA 624-57. Amtrak holds regular and special board of directors meetings, JA 636, and issues annual reports, JA 602-23. Like any other for-profit corporation—but unlike any government agency or entity—Amtrak files U.S. corporate income tax returns. JA 598-601.

Amtrak is authorized to issue and have outstanding two classes of capital stock, common and preferred, both of which are eligible to vote and receive dividends. 45 U.S.C. § 544.[12] Amtrak's common shares are held

[10] The district court and petitioner incorrectly state that $2.113 billion was the price paid for the Northeast Corridor properties conveyed to Amtrak. Pet. App. 9b n.7; Br. Pet. 6, 10.

[11] These percentages are reflected in Amtrak's "Revenue-to-Expense Ratio." *See* JA 620, 375, 699.

[12] Petitioner states erroneously (and repeatedly) that Amtrak's common shareholders have no voting rights. *E.g.*, Br. Pet. 8, 21. While the common shareholders do not elect Amtrak's directors,

by four other private railroads: The Grand Trunk Western Railroad Company, Burlington Northern, Inc., Soo Line Railroad Company, and The Penn Central Corporation (which is no longer in business as a railroad). JA 134. The United States holds Amtrak's preferred stock, which it received in exchange for financial assistance to the corporation. 45 U.S.C. § 544(c).

Amtrak's nine-person board of directors is composed primarily of private individuals associated with the railroad industry. They include two board members selected by the President from a list submitted by commuter authorities; one member selected by the President from a list recommended by the Railway Labor Executives Association, a labor organization; one selected by the President from among governors of states with an interest in rail transportation; one selected by the President "as a representative of business with an interest in rail transportation"; two members selected by the Secretary of Transportation as holder of Amtrak's preferred shares; the Secretary of Transportation; and the president of the corporation, who is selected by the other board members. 45 U.S.C. § 543. With the exception of the Secretary of Transportation and the president of the corporation, Amtrak's board members serve defined terms, as set forth in the RPSA. *Id.*

Amtrak is not covered by the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1988), and, unlike the federal government, is subject to liability for punitive damages. *See, e.g., Sentner v. Amtrak*, 540 F. Supp. 557 (D.N.J. 1982). Amtrak is not an "agency" within the meaning of the Administrative Procedure Act. *See* 5 U.S.C. § 551(1) (1988); *Ehm v. National Railroad Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984). Nor is Amtrak subject to the procurement and contracting requirements that apply to the government. *See* 41 U.S.C. § 5 *et seq.* (1988).

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they are entitled to vote on all other matters. *See* 45 U.S.C. § 544; H.R. Rep. No. 1580, *reprinted in* 1970 U.S.C.C.A.N. at 4742.

The United States does not supervise Amtrak's day-to-day operations. Nor are any of Amtrak's officers and employees employed by the federal government. JA 134.

B. The Spectacular

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular." Pet. App. 3a. The Spectacular was constructed in 1967 by Transportation Displays, Incorporated ("TDI"), a privately held advertising company, pursuant to a contract with the Pennsylvania Railroad Company, which then owned Penn Station. The contract gave TDI the right to "construct and maintain, at [its] own cost and expense, an advertising [S]pectacular display for sale to advertisers." JA 318. TDI agreed to pay the railroad a percentage of the gross receipts derived from advertising displayed on the Spectacular, and it agreed further that no advertisement would be displayed without prior approval of the railroad. JA 319, 325-26.

Amtrak, which now owns Penn Station and exercises complete control over the area where the Spectacular is located, has continued essentially the same arrangement that the Pennsylvania Railroad Company had with TDI. The contract now in effect between Amtrak and TDI authorizes TDI to sell advertising space on the Spectacular and in other locations, and provides that TDI shall pay Amtrak a percentage of its net receipts. JA 201-02. It also expressly provides that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of presentation and design, shall be subject to approval by Amtrak." JA 204.

Advertising on the Spectacular is overseen by Amtrak's Real Estate and Operations Development Department, which is responsible for all corporate profit-making ventures other than running the railroad. JA 15-17. The Vice President for that Department, Anthony DeAngelo,

applies Amtrak's advertising policies and makes the final decision whether to approve ads for the Spectacular. JA 15-16.

Political advertising has always been prohibited on the Spectacular. JA 15, 34, 326; C.A. App. 844. The Pennsylvania Railroad Company adopted that policy in 1967 when the Spectacular was first built—years before Amtrak was created. JA 326. Amtrak continued the policy when it assumed control over the Spectacular in 1976 because, like the Pennsylvania Railroad, it recognized that partisan displays might offend some of its customers. JA 15-16. In the 27 years since its construction, no political or other noncommercial advertisement has ever appeared on the Spectacular. As Chief Judge Newman noted in his dissent below, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's political agenda.'" Pet. App. 16a.

C. Amtrak's Rejection of Petitioner's "Advertorial"

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a flaming Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the advertorial contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "The Far Right's political agenda." Pet. App. 5a; *see* appendix to this brief.

On November 30, 1992, petitioner signed a contract with TDI to display his ad for two months on the Spectacular. JA 669. Petitioner knew when he signed the TDI contract that the "transportation facility" (*i.e.*, Amtrak) retained the right to reject his ad. C.A. App. 269-74. And he anticipated that there might be objection to the display of his advertorial on the Spectacular because of its "unusual nature." As he conceded, "[i]t wasn't

commercial in the way they are used to." C.A. App. 228. In fact, "because of the subject matter" of his work, petitioner deliberately avoided disclosing its content to TDI until December 2, 1992, two days after he signed the TDI contract. C.A. App. 201-03, 211.

On December 17, the ad was presented to Amtrak's Vice President, Anthony DeAngelo, for his approval. He immediately rejected the ad as political. JA 36, 122-24. In a letter dated December 23, 1992, DeAngelo notified TDI of his decision, invoking Amtrak's longstanding "policy . . . that it will not allow political advertising on the [S]pectacular advertising sign." Pet. App. 5a.

D. The Decisions Below

Petitioner commenced this action on December 30, 1992. After a trial conducted on documentary submissions, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. Noting that "[p]laintiff does not contend that Amtrak is a governmental agency," the court held, nevertheless, that Amtrak "must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards." Pet. App. 10b, 14b. The district court then ruled that Amtrak's rejection of petitioner's ad violated the First Amendment. A three-judge panel of the court of appeals issued a stay pending appeal. Pet. App. 6a.

In an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that Amtrak is not a government actor for constitutional purposes. Pet. App. 12a. The court began its analysis by noting that Amtrak is "a private, for-profit corporation under the District of Columbia Business Corporation Act," and that Congress specified that "Amtrak is 'not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government.'" Pet. App. 7a (quoting 45 U.S.C. § 541). The court of appeals wrote, as petitioner had argued, that the question whether Amtrak is a government actor was governed by

the framework for "discerning the presence of government action in the activities of private entities" set forth in this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149 (1978), *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Pet. App. 7a-8a.

Looking to the "numerous cases" holding that Amtrak and the similarly structured Conrail are not "subject to constitutional restraints upon government action," Pet. App. 11a, the court of appeals quoted with approval its earlier finding in one such case: "[D]espite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities." Pet. App. 9a (quoting *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985)). The court then held that "[i]n view of this unvarying line of authority, and the fact that our pertinent precedent [*Myron*] addressed an issue of First Amendment retaliation, . . . we conclude that Amtrak's refusal to run [petitioner's] advertisement on the Spectacular was not governmental action . . . ." Pet. App. 12a. Chief Judge Newman dissented from that conclusion.

The panel majority did not reach the question whether Amtrak's advertising policy would have withstood First Amendment scrutiny if Amtrak were a government actor.

SUMMARY OF ARGUMENT

Amtrak is a nongovernmental, for-profit corporation created to perform the commercial function of operating a railroad. Such a corporation is free to determine for itself whether it wishes to provide a forum for political speech in its facilities. And absent evidence that the government has coerced or influenced the corporation's decision to ban political advertising, that decision is not subject to challenge under the First Amendment.

1. Amtrak is not a government entity, and the petitioner so conceded in the courts below. The statute that

authorized the creation of Amtrak provides expressly that "[t]he Corporation will not be an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541. The same statute instructs that Amtrak "shall be operated and managed as a for profit corporation." *Id.* Congress was not engaged in a sham, and it was not mistaken, when it adopted these provisions. They accurately reflected Congress's intent that Amtrak exercise a commercial, not a governmental function, and that it operate as a commercial enterprise, distinct from the government. There is no reason for this Court to disregard these "constitutional" provisions that tell Amtrak what it is and how it should conduct itself.

This Court has, in fact, already held that Amtrak is a nongovernmental entity, whose contractual obligations are not those of the United States. *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985). That decision forecloses petitioner's contention, asserted for the first time in this Court, that Amtrak is a government entity, subject at all times and in all settings to the commands and constraints of the Constitution. In addition, in a variety of settings, numerous courts of appeals and district courts unanimously have rejected the contention that Amtrak's actions are subject to constitutional constraints. Those decisions also confirm that Amtrak is not a government entity.

2. This Court has held generally that a decision of a nongovernmental entity, such as Amtrak, is subject to constitutional constraints "only when [the government] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the [government]." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). There is no evidence that the government exercised any coercive power or encouragement in this case. The policy of prohibiting political advertising on the Spectacular was developed by the private railroad that owned Penn Station

before Amtrak. It has been continued and applied by Amtrak's real estate department for purely commercial reasons and without government interference or influence. The government, in short, has had no role in formulating or applying the policy against political advertising. For this reason, there has been no government action in this case.

3. In a very limited factual and legal setting, this Court has recognized that *inaction* by the government may trigger application of the equal protection clause of the Fourteenth Amendment. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court held that the government's failure to ensure nondiscriminatory access to the portion of a public building leased to a restaurant violated the Fourteenth Amendment, at least when the restaurant was indispensable to the financial success of the government operation occupying the remainder of the building. Even in the context of racial discrimination, however, the holding in *Burton* has been limited to its facts. It should not be extended to this case. *Burton* recognized that the government's "inaction" may in some circumstances constitute an "abdicat[ion]" of its affirmative "responsibilities under the Fourteenth Amendment." *Id.* at 725. But the First Amendment imposes no comparable responsibility upon the government to prevent a nongovernmental entity from excluding political advertising from that entity's facilities. To the contrary, the First Amendment commands the government *not* to interfere in such matters. The federal government's inaction in this case, therefore, does not raise a constitutional question.

ARGUMENT

Petitioner argues that Amtrak is either (1) a government entity whose actions always constitute government action or (2) a nongovernmental entity whose actions constitute government action in this case. The first argument was explicitly waived by the petitioner below. Both are wrong.

I. AMTRAK IS NOT A GOVERNMENT ENTITY

A. Petitioner Has Conceded That Amtrak Is Not a Government Entity

Petitioner's theory of government action has undergone a complete reversal in this Court. In the lower courts, petitioner conceded that Amtrak is a "private entity." Thus, petitioner explained to the district court: "*plaintiff does not contend that Amtrak is a government entity, but a private entity so interrelated to federal and state entities that it should be treated as a state actor here* . . . ." C.A. App. 1308 (Plaintiff Michael Lebron's Pre-Trial Proposed Conclusions of Law, at 12 n.1 (emphasis added)). The district court explicitly noted petitioner's concession:

> Plaintiff does not contend that Amtrak is a governmental agency. What plaintiff contends is that the federal government is sufficiently intertwined in Amtrak's operations and authority that the particular actions at issue must be deemed governmental action. Pet. App. 10b.

Similarly, in the court of appeals, petitioner responded to the unbroken line of authority holding that Amtrak is not a government entity—including this Court's decision in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985)—by once again arguing:

> Many of the cases cited by Amtrak do not address state action issues at all, but simply state that Amtrak is not a governmental entity. *Since Lebron does*

> *not contend that Amtrak is a government entity per se, but rather is so interrelated to state entities that it should be treated as a state actor here, these cases are inapposite.*

Brief for Michael A. Lebron in the Court of Appeals, at 30 n.39 (emphasis added). Petitioner's sole argument was that "[a] *private entity* can be a state actor for some purposes but not others." *Id.* at 30 (emphasis added). Like the district court, the court of appeals accepted petitioner's framing of the question and agreed with petitioner that the question was governed by this Court's framework "for discerning the presence of government action in the activities of private entities." Pet. App. 7a.

Recognizing that he cannot establish that the federal government coerced or encouraged Amtrak's decision to reject his advertorial, *see* Part II, *infra*, petitioner now argues just the opposite of what he argued below: "In most state action cases, the Court must determine whether the conduct of a private entity should be treated as state action because of government involvement with that entity. Here, by contrast, the entity that acted—Amtrak—is itself a governmental entity." Br. Pet. 17.

Petitioner's new argument, advanced for the first time in his brief on the merits,[13] is not properly before the Court. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); *see also*

[13] The petition presented the question that was presented below—whether there was government action in this case based on the government's relationship to a nongovernmental entity. The question whether Amtrak is a government entity is perhaps a "related" or "complementary" question, but "neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both [*i.e.*, whether there was government action in this case] . . . , but the two exist side by side, neither encompassing the other." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992); *see* S. Ct. R. 14.1(a). If the petition had raised the separate question now being presented in petitioner's brief, respondent would have opposed the petition on the ground that the argument was conceded below.

Taylor v. Freeland & Kronz, 112 S. Ct. 1644, 1649 (1992); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 n.2 (1989); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). Even more clearly, the Court does not consider arguments that were "expressly waived" and affirmatively "abandoned" in the courts below. *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *see also Steagald v. United States*, 451 U.S. 204, 209, 211 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).[14]

Because petitioner has presented as the principal point in his brief an argument that he explicitly waived below—and because he has virtually withdrawn the contention argued so vigorously in his petition and reply that "Amtrak's Presidentially-appointed Board explicitly adopted the policy against political advertising at issue here," Reply Mem. 3; *see* p. 38, *infra*—it would be appropriate to dismiss the petition as improvidently granted. *See, e.g., Springfield v. Kibbe, supra*; *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). At the very least, petitioner's attack on the court of appeals' decision should be limited to the arguments that he presented to the court of appeals. He should not be permitted to argue that the court of appeals was wrong for a reason that he explicitly disavowed in both courts below.

[14] In *Yee v. City of Escondido, supra*, the Court noted that when a federal constitutional claim is made in state court, the parties are not limited in this Court "to the precise arguments made below" in support of that claim. 112 S. Ct. at 1532. In that case, however, its was "unclear" whether the petitioner had raised, and whether the court of appeals had addressed, the argument in question. Here, by contrast, it is clear not only that the argument was not raised or addressed, but that it was explicitly withdrawn as conceded. Petitioner here, "through [his] assertions, concessions, and acquiescence, has lost [his] right" to argue that Amtrak is a government entity. *Steagald v. United States*, 451 U.S. at 211.

B. Amtrak's Status as a Nongovernmental Entity Is Firmly Established

Petitioner's attempt to reverse course in this Court is futile in any event. As Congress, this Court, and every lower court that has considered the issue have made clear, Amtrak is *not* a government entity.

1. *Congress Has Declared That Amtrak Is Not a Government Entity*

The statute that authorized the creation of Amtrak also defined its identity. Congress specifically declared that Amtrak "will not be an agency or establishment of the United States Government." Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970). Rather, Amtrak was established as a "for profit corporation" organized under the District of Columbia Business Corporation Act. *Id.*[15]

Congress's determination that Amtrak should function as a for-profit corporation, not a government agency, has not wavered since Amtrak's inception. Even as Amtrak encountered difficulty attaining its objective of making a profit, Congress reaffirmed its determination that Amtrak "shall be operated and managed as a for profit corporation." Pub. L. No. 95-421 (1978); 45 U.S.C. § 541. The stated purpose of this reaffirmation was simply to "insur[e] that Amtrak is operated as a for profit corporation even though it may continue to require very substantial operating subsidies."[16] Again in 1988, Congress

[15] That Congress authorized Amtrak's incorporation is of no significance. "[A]ll corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-44 (1987).

[16] House Committee on Interstate and Foreign Commerce, Amtrak Improvement Act of 1978, H.R. Rep. No. 1182, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2317.

reaffirmed Amtrak's nongovernmental status when it amended the RPSA to state that "[t]he Corporation will not be an agency, *instrumentality, authority, or entity*, or establishment of the United States Government." 45 U.S.C. § 541 (italicized language added).[17]

Amtrak is different in this respect from the other "corporations" referred to in petitioner's brief—the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Federal Crop Insurance Corporation, and the Pension Benefit Guaranty Corporation. Each of those corporations was created explicitly as an agency or instrumentality of the United States.[18] Amtrak is also differ-

[17] The fact that Congress has decided, selectively, to make Amtrak subject to a handful of statutes that apply to the government does not alter its basic determination that Amtrak is not part of the government. Indeed, the fact that Congress felt it necessary to provide explicitly in the RPSA that Amtrak is subject to the Freedom of Information Act reflects the fact that Amtrak is not an "agency" subject to FOIA under its own terms. *See* 45 U.S.C. § 546(g) ("The Corporation shall be subject to the provisions of section 552 of title 5."); 5 U.S.C. § 552(f) (defining "agency"). Contrary to petitioner's contention, Amtrak is not subject to the Government in the Sunshine Act because, even if it were an "agency" under § 552(f), it is no longer headed (as it once was) by a board a majority of which is appointed by the President "with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1). And it does not help petitioner that Amtrak is included in a list of "mixed-ownership Government corporations" subject to certain financial reporting requirements, 31 U.S.C. § 9101(2), or that it is included as a "designated Federal entity" (which is excluded from the definition of a *true* "Federal entity") under the Inspector General Act, 5 U.S.C. app. 2 § 8G(a). Finally, the fact that the Americans with Disabilities Act treats Amtrak as a "public entity," 42 U.S.C. § 12131(1), along with State and local governments (but not the federal government or any of its agencies or entities), does not reflect a congressional determination that Amtrak is part of the United States government. Indeed, the legislative history to the Act specifically notes that *"Amtrak is a private corporation and is not part of the federal government."* H.R. Rep. No. 485(IV), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 520 (emphasis added).

[18] *See* 12 U.S.C. § 1441a(b)(1)(A) ("There is hereby established a Corporation to be known as the Resolution Trust Corporation

ent in this respect from the entity involved in what petitioner incorrectly calls "[t]he most analogous state action case that this Court has decided," *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957). Br. Pet. 22. As the name of that entity itself made clear, the Board of Directors of City Trusts *of the City of Philadelphia* was "an agency of the State." 353 U.S. at 231. It was created as an "instrumentality" of the city to "exercise and discharge . . . the duties and powers of said city." Pa. Stat. Ann., tit. 53, § 16365 (1957); *see also id.* § 16370 (board members "shall be considered agents or officers of said city").

2. *This Court Has Held That Amtrak Is Not a Government Entity*

In *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., supra*, this Court upheld the constitutionality of amendments to the RPSA that required Amtrak's predecessor passenger railroads to reimburse Amtrak for "pass-rider" privileges enjoyed by their employees on Amtrak trains. The railroads had argued that the RPSA, and the Basic Agreements entered into by Amtrak and the railroads pursuant to the RPSA,

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which shall be an instrumentality of the United States"); 7 U.S.C. § 1503 ("[T]here is hereby created as an agency of and within the Department of Agriculture a body corporate with the name 'Federal Crop Insurance Corporation'"), § 1512 (FCIC can act "as a financial agent of the Government"); 29 U.S.C. § 1302(a) ("There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation"); 12 U.S.C. § 1819(b)(1) (Federal Deposit Insurance Corporation "shall be an agency of the United States" for purposes of district court jurisdictional provision), § 1815(e)(3) (FDIC an agency for purposes of APA judicial review provisions), § 1825(d) (FDIC obligations backed by the "full faith and credit of the United States").

It is appropriate that these entities be treated as government agencies for the additional reason that, unlike Amtrak, they perform governmental functions and do not compete in the private sector. *See* pp. 24-26, *infra*.

"created a contractual obligation on the part of the United States not to reimpose any rail passenger service responsibilities on those railroads that entered into Basic Agreements, and that the pass-rider amendments to the Act *unconstitutionally impair*[*ed*] *the 'contract' into which the United States entered.*" 470 U.S. at 465 (emphasis added). A unanimous Court rejected that argument. Examining the RPSA, the Court concluded:

> By its terms, the Act does not create or speak of a contract between the United States and the railroads, and it does not in any respect provide for the execution of a written contract *on behalf of the United States*. Quite to the contrary, the Act expressly established the National Railroad Passenger Corporation as a nongovernmental entity, 45 U.S.C. § 541, and it used the term "contract" not to define the relationship of the United States to the railroads, but instead that of the new, nongovernmental corporation to the railroads. *Id.* at 467 (emphasis in original).

Accordingly, the Court held that the RPSA was not a contract between the United States and the railroads. *Id.* at 467-69.

Next, the Court considered "whether the Basic Agreements into which the railroads entered with Amtrak grant the railroads a contractual right *against the United States* to be free from all obligation to provide passenger service." *Id.* at 470 (emphasis in original). Again the Court held that the Basic Agreements "do not implicate the United States," because "they are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak." *Id.* at 470-71.[19]

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[19] The railroads argued further that even if the Basic Agreements were contracts between private parties, the pass-rider amendments unconstitutionally impaired a private contractual right. In rejecting that argument, the Court found it necessary to consider the substance of the Agreements. *Id.* at 472-78. Petitioner argues that the Court could have relied on the same analysis to dispose of the argument that the pass-rider amendments impaired a contractual obligation of the United States. Br. Pet. 28 n.39. But the

Thus, this Court explicitly held in the pass-rider case that Amtrak is a "nongovernmental" entity, legally distinct from the United States, whose actions "do not implicate the United States." 470 U.S. at 470-71.[20] Two years ago, the Court again characterized Amtrak as a "private, for-profit corporation" and "not an agency or instrumentality of the United States Government." *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1398 (1992). *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974) (accepting Congress's declaration that similarly structured Conrail is "not . . . an agency or instrumentality of the Federal Government"). Nothing has changed since these decisions to alter Amtrak's character and convert the corporation into a government instrumentality after all.[21]

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fact is that the Court did not do so: the *only* ground on which the Court rejected the argument that Congress had unconstitutionally impaired a contractual obligation of the United States was that Amtrak was not a government entity, but a "nongovernmental" corporation. 470 U.S. at 467, 470. It is not at all clear that the Court would have reached the same result had it been forced to "confront an alleged impairment, by the Government, of its own contractual obligations . . . ." *Id.* at 471. The pass-rider amendments might not have withstood the "more rigorous standard of review" applicable in such cases. *Id.* In any event, what matters is that the Court found it necessary to determine that the Basic Agreements were not contracts of the United States. Contrary to petitioner's contention, that determination was not dictum.

[20] In light of this Court's conclusion that Amtrak's contractual obligations are not those of the United States, it is irrelevant that the Court almost fifty years ago, in a case upon which petitioner relies, held that contractual indebtedness to the Reconstruction Finance Corporation was indebtedness to the United States. *See* Br. Pet. 23 (citing *Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946)).

[21] Amtrak's structure and operations at the time these cases were decided were essentially the same as they are today. The only significant difference is that when the *Atchison, Topeka & Santa Fe* case was decided in 1985, Amtrak relied upon federal subsidies to cover 42% of its operating expenses, as opposed to 18% today. JA 614, 699.

3. *The Lower Courts Have Unanimously Concluded That Amtrak Is Not a Government Entity*

Every other court that has addressed the question whether Amtrak or the similarly structured Conrail[22] is a government entity, or a governmental actor for a particular constitutional purpose, has concluded that it is not. There are at least a dozen decisions by the courts of appeals and district courts to this effect. *See Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) ("The ties between Amtrak and the federal government do not warrant a finding of governmental action for purposes of the fifth amendment."); *Ehm v. National Railroad Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984) (Amtrak not a "Government controlled corporation"); *Wilson v. National Railroad Passenger Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992) (Amtrak not a governmental actor); *Railway Labor Executives Ass'n v. National Railroad Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) ("[Plaintiffs] claim Amtrak is a governmental enterprise because it was created by Congress and relies heavily on federal funds. This argument has been uniformly rejected by federal courts and this Court concurs in their analysis."); *Marcucci v. National Railroad Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984) (Amtrak not a governmental actor); *Kimbrough v. National Railroad Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982) ("Despite the financial controls exerted by the federal government, it is clear

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[22] Both the district court and court of appeals below found Amtrak and Conrail (at the time of the Conrail decisions) to be "similarly structured" for constitutional purposes, Pet. App. 10b, 9a, as have all the other courts that have addressed the issue. *See Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987). Congress authorized the creation of Amtrak and Conrail as "for profit" corporations to operate, respectively, commercial passenger and freight railroads. *Compare* 45 U.S.C. § 541 *with* 45 U.S.C. § 741; *see also* note 28, *infra*.

that Amtrak was chartered as a for-profit corporation and is to be operated and managed as such. . . . Amtrak is to be considered a private corporation rather than a federal government entity."); *Sentner v. Amtrak*, 540 F. Supp. 557, 560 (D.N.J. 1982) ("Amtrak is not a United States government agency, establishment or instrumentality, and therefore may be subject to liability for punitive damages."); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982) (Amtrak not a governmental actor); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987) ("Conrail . . . is not an entity of the federal government for purposes of the due process clause."); *G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 723 (7th Cir. 1987) ("Conrail, like Amtrak, is not an entity of the federal government for purposes of the due process clause."); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 55-56 (2d Cir. 1985) ("[D]espite an obviously close relationship, the federal government has not so far insinuated itself into a position of interdependence with Conrail that the latter's personnel decisions can be considered federal action.") (citation omitted).

In unanimously reaching these conclusions, these courts have considered and rejected virtually all of the arguments petitioner has asserted in this case.

C. There Is No Reason To Revisit Congress's Declaration, and the Courts' Determination, That Amtrak Is a Nongovernmental Entity

Petitioner now attempts to abandon his prior concession and to argue that the Congress and the courts have mislabeled Amtrak. It is important to emphasize the breadth of petitioner's present argument. His position is not simply that the government is responsible for the Amtrak decision at issue in this case. Rather, petitioner's position is that all of Amtrak's business decisions constitute government action because Amtrak is, as a matter of law, part of the government.

Congress has declared repeatedly, however, that Amtrak is not part of the government. Petitioner urges the Court to reject that congressional declaration as a mistake or sham. But it is neither. Congress's declaration was not only a definition of Amtrak's identity; it was an *instruction* that Amtrak and the government are distinct entities and should conduct themselves as distinct entities. Amtrak is not to conduct itself as the government, but "as a for profit corporation," and the government is not to treat Amtrak as an agency of government. Amtrak does not speak or act for the government, and the government is not bound by what Amtrak says or does. In short, Amtrak and the government are related to each other, but they are not one and the same.[23] A consideration of the relevant facts confirms that conclusion.

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[23] None of this is to say that Congress can ultimately determine whether the Constitution applies to a particular action Amtrak takes. If this Court's tests for government action, discussed in Parts II and III of this brief, are met, the Constitution will apply. But Congress ultimately has the power to define the kind of entity that it has created. Having done so in clear and unambiguous terms, Congress's designation of Amtrak as a nongovernmental entity should be accepted absent proof that it was plainly mistaken or engaged in a mere sham. *See, e.g., Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 (1987) ("Deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (citation omitted).

1. *Amtrak Does Not Perform a Traditional Government Function*

Congress authorized the creation of Amtrak as a non-governmental, for-profit corporation because that is precisely what it wanted Amtrak to be, and how it wished the corporation to conduct its affairs. Amtrak does not in any sense "govern"; it runs a commercial railroad.

This is not a case in which the government has conveyed a traditionally public function to a nominally "private" entity in an attempt to circumvent the Constitution or for some other reason. *Cf. Terry v. Adams,* 345 U.S. 461 (1953) (running of state pre-primary elections); *Marsh v. Alabama,* 326 U.S. 501 (1946) (operation of company town). In such circumstances, it may be appropriate to look through the nominally private character of the entity to ensure that the Constitution continues to constrain the performance of "governmental" functions. But there is no similar imperative that the Constitution apply to all the decisions and activities of a commercial railroad.

Petitioner acknowledges that Amtrak does not perform a "traditional public function," but he argues that the corporation's provision of "an essential public service . . . supports a finding of federal action here." Br. Pet. 41. That argument is foreclosed by this Court's precedents. As the Court stated in *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982),

> our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State." . . . That a private entity performs a function which serves the public does not make its acts state action. (citations omitted) (emphasis in original).

See also San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 544 (1987).

Neither passenger transportation in general nor rail passenger transportation in particular has "traditionally" been regarded as an "exclusive" governmental function. Rather, as this Court has noted, "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[]." *United Transportation Union v. Long Island Railroad Co.,* 455 U.S. 678, 686 (1982).

Petitioner notes that Amtrak is the only entity today providing intercity rail passenger service. But that hardly establishes that the service provided is governmental in nature. The same could be said of the United States Olympic Committee, which was established by Congress to serve as the "exclusive" national body and "sole authority" performing the important public functions of representing the United States and coordinating U.S. participation in the Olympic and Pan-American Games. *San Francisco Arts,* 483 U.S. at 538 n.17, 534. As in this case, Congress identified an activity that "serve[d] a national interest" and determined that government intervention was required to establish a single entity to take responsibility for that activity. *Id.* at 544. Those facts were not enough to persuade this Court that the functions were traditional governmental functions or that the USOC was a government actor. *See* pp. 35-36, *infra.*

Contrary to petitioner's contention, Amtrak was not established to accomplish "purely governmental purposes." Br. Pet. 23 (quoting *Cherry Cotton Mills v. United States,* 327 U.S. 536 (1946)). Intercity passenger transportation has traditionally been performed by private entities. By its nature, it is a commercial operation, not a regulatory or governmental function.[24] That fact both explains and

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[24] Petitioner's assertion that unlike all other private entities, Amtrak exercises the "traditional sovereign power" of eminent domain, Br. Pet. 9, is wrong in two respects. First, "Amtrak has not been authorized to exercise the sovereign's power of eminent domain. It has been granted a limited power, within the meaning of *United States v. Carmack,* 329 U.S. 230 (1946), to condemn

confirms Congress's determination that Amtrak should be a commercial, not a governmental, entity.

2. *Government Subsidies and Equity Interest Do Not Render Amtrak a Government Entity*

The federal government has provided substantial financial support to Amtrak, but this Court has held repeatedly that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco Arts*, 483 U.S. at 544.[25] Even more clearly, the government may subsidize an entity without making it part of the government.[26]

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land 'required [for] intercity rail passenger service.' 45 U.S.C. § 545(d)(1)(B)." *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987). Second, private railroads (and other private entities) have long possessed such limited condemnation power. *See* 1A J. Sackman, *Nichols' The Law of Eminent Domain*, § 3.231 (rev. ed. 1994) ("Within the limitations of a statutory or constitutional provision delegating the power of eminent domain . . . a railroad company has full capacity to receive and exercise the power of eminent domain.") (citing cases and statutes from 30 states).

Similarly, private railroads other than Amtrak historically have been granted the power to employ their own police. *See, e.g., Russell v. National Mediation Board*, 714 F.2d 1332, 1334 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (Atchison, Topeka and Santa Fe Railroad police force); *United States v. Hoffman*, 498 F.2d 879, 880 (7th Cir. 1974) (Penn Central Transportation Company police force); *Cooper-Houston v. Southern Railway Co.*, 822 F. Supp. 715, 717 (N.D. Ga. 1993) (Southern Railway police force). Indeed, in 1975, 41 states by statute permitted the commissioning of special railway police. *See* Dralla, Honig, Port, Power & Simmons, *Who's Watching the Watchman? The Regulation, or Non-Regulation, of America's Largest Law Enforcement Institution, the Private Police*, 5 Golden Gate L. Rev. 433, 474 (1975).

[25] Petitioner emphasizes the amount of Amtrak's subsidies, but the reality is that subsidies today cover only 18% of Amtrak's operating costs. JA 699. Amtrak is considerably less dependent on the government than the nursing homes in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and the school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). *See* pp. 34-35, *infra*.

[26] The federal government routinely dispenses billions of dollars to private entities that remain distinctly private. Recipients of such financial support include, for example, (1) American farmers, *see, e.g.*, Commodity Credit Corporation, U.S. Dept. of Agriculture, Commodity Estimates Book FY 1995 Mid-Session Review B-1 (July 15, 1994) (documenting $11 billion paid to American farmers in FY 1993 in the form of loans and direct cash payments), (2) the airline industry, *see, e.g.*, Pub. L. No. 102-388, 106 Stat. 1520, 1526 (1993) (appropriating $2 billion for airport planning and development), and (3) the Chrysler Corporation, *see* Pub. L. No. 96-185, 93 Stat. 1324, 1331 (1979) (authorizing up to $1.5 billion in loan guarantees to save the troubled auto maker). American Airlines, Chrysler and the American farmer are obviously not government entities.

Nor does the fact that the federal government has acquired an equity interest in exchange for its financial assistance convert the ~~corporation into~~ the government. It is elementary that "the corporation is an entity distinct from the shareholders." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 25, at 512 (rev. ed. 1990). This truism applies "whether the corporation has many stockholders or only one." *Id.* at 514. It also applies when the government is the sole shareholder. "National banks and other national corporations, including those which are government-owned, are distinct entities." *Id.* at 513. Thus, Amtrak and the United States remain legally distinct, notwithstanding that the government holds Amtrak's preferred stock. *See Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824) (Marshall, C.J.) ("The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it."); *cf. National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 190 (1988) (NCAA a private actor even though "many NCAA member institutions [a]re either public or government supported.").

Indeed, the federal government's ownership of Amtrak's preferred shares reflects an important distinction between the corporation and government entities. Prior to 1981, Amtrak received financial subsidies primarily in the form of outright grants. As part of the Amtrak Im-

provement Act of 1981, Congress demanded, as a condition of future financial support, that Amtrak convey to the United States preferred stock equal in par value to all past and future federal appropriations. Pub. L. No. 97-35; 45 U.S.C. § 544(c). These shares carry cumulative dividends of not less than six percent per annum, which must be paid in full prior to the declaration of any common share dividends. 45 U.S.C. § 544(a)(B)(i). Thus, the government's accumulation of preferred shares provides a basis for it to receive some return on its investment. By contrast, Congress dispenses money to federal agencies and entities not with the requirement or expectation that these funds be repaid in whole or in part, but simply because these entities are part of the government.

3. *The Composition of Amtrak's Board of Directors Does Not Render Amtrak a Government Entity*

Petitioner argues that the federal government's authority to appoint all but one of Amtrak's directors supports a finding that Amtrak is a government entity. Government officials, however, do not have unfettered discretion to appoint whomever they desire. Two of the directors appointed by the President are selected from a list compiled by commuter authorities; one is selected from a list compiled by the Railway Labor Executives Association, a labor organization; one is selected from among governors of states with an interest in rail transportation; and one is selected as a representative of business with an interest in rail transportation. *See* 45 U.S.C. § 543.

More importantly, with the exception of the Secretary of Transportation and one governor, Amtrak's board members are not public officials or employees. They are private citizens, appointed to serve specified terms. Unlike government employees, Amtrak's board members do not take an oath of office. *Cf.* 5 U.S.C. § 3331 (1988). Rather, Amtrak's directors—like the directors of any other private corporation—assume a fiduciary duty to the

corporation and its shareholders, common and preferred.[27] That duty is not to operate Amtrak as part of the government, but "as a for profit corporation." 45 U.S.C. § 541. It is not to discharge a governmental function, but to oversee a commercial one. The board's duty is to maximize revenues and minimize costs, so as to protect the economic interests of all of the corporation's investors. It is, in short, the duty of a corporate director, not that of a government official.

This Court has considered—and rejected—precisely the same argument that petitioner advances here in a case involving the similarly structured Conrail. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974), the Court ruled that Conrail is not a "federal instrumentality" for constitutional purposes "by reason of the federal representation on its board of directors."[28] In that case, parties with interests in the Penn Central Transportation Co. ("Penn Central") challenged the 3-R Act, pursuant to which Conrail received certain rail properties from other railroads in exchange for Conrail stock and other payments. Penn Central argued, *inter alia*, that because Conrail was a "federal instrumentality," the statute constituted an unconstitutional

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[27] *See, e.g., Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Ass'n*, 441 A.2d 956, 962 (D.C.), *cert. denied*, 459 U.S. 827 (1982) ("Officers and directors of a corporation owe a fiduciary duty to the corporation and to its shareholders, which requires them to act in good faith in managing the affairs of the corporation."); *see generally* 3 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 837.50 (rev. ed. 1994).

[28] Of Conrail's 15 directors, five were appointed directly by the President, one was the Secretary of Transportation, and two were the chairman and president of the United States Railway Association (created as a "government corporation," 45 U.S.C. § 711(c)). *See* 419 U.S. at 152 & n.40. The chairman of the USRA was appointed by the President, with the advice and consent of the Senate. *See* Pub. L. 93-236, 87 Stat. 985, 988 (1974). The president of the USRA was appointed by the directors of the USRA (all of whom were appointed directly by the President), upon the recommendation of the Secretary of Transportation. *Id.* at 989.

"exercise of eminent domain power." 419 U.S. at 149. This Court disagreed:

> [I]t is contended that despite the express provision of § 301(b) that Conrail "shall not be an agency or instrumentality of the Federal Government," . . . federal participation through federally appointed members of the board of directors constitutes Conrail a federal instrumentality. . . . *But Conrail is not a federal instrumentality by reason of the federal representation on its board of directors. . . . The responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders.* 419 U.S. at 152 (emphasis added) (citation deleted).

Accordingly, the Court concluded that "Conrail will be basically a private, not a governmental, enterprise." *Id.*

There is no distinction between the responsibilities of the Conrail directors in the *Regional Rail Reorganization Act Cases* and the Amtrak directors in this case. Nor should there be any difference in the conclusion to be drawn. The presence of federally appointed directors does not transform Amtrak into a "federal instrumentality" or a "governmental" enterprise. *Id.*

4. The Government Is Not Involved in Amtrak's Day-to-Day Operations

Petitioner argues, in effect, that this Court should "pierce the corporate veil" that surrounds Amtrak and declare that its actions should be treated in all respects as the actions of the United States, its preferred shareholder. In the corporate world, however, neither 100% stock ownership nor the concomitant power to select directors is sufficient to pierce the corporate veil between a parent and a subsidiary. And neither should those facts suffice here.

The test for determining whether a corporate veil should be pierced is whether the parent or stockholder exercises "control, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will, or existence of its own . . . ." 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 41.10, at 616 (rev. ed. 1990). That test, like the "close nexus" test discussed in Part II of this brief, focuses on the exercise of actual control over the particular transaction at issue, not mere ownership or resulting ability to control in general.

The extreme argument offered by the petitioner—that the corporate veil should be pierced for all corporate actions—necessarily requires proof of more extensive involvement, not less, than would be required to support a finding of government responsibility for a single transaction. If the government is to be held responsible for all of Amtrak's actions, there should be proof that the government is involved generally and pervasively in the day-to-day operations of the company, and that it in fact exercises "complete domination" of all of the company's business activities. *Id.* It clearly does not.

Amtrak's day-to-day operations and business practices do not differ in any relevant respect from those of the railroads Amtrak succeeded, or from those of the airlines and bus companies with which Amtrak competes. Amtrak runs a railroad and does so without involvement by the federal government in its daily operations. As several lower courts have found, "Amtrak's daily operation is not subject to close government supervision; nor are Amtrak's daily affairs conducted by federal employees." *Anderson v. National Railroad Passenger Corp.*, 754 F.2d at 204; *see also Ehm v. National Railroad Passenger Corp.*, 732 F.2d at 1255 ("Amtrak's day-to-day operations are not subject to close government supervision. The officers and employees who conduct Amtrak's day-to-day affairs are not federal employees."); *cf. Myron v. Consolidated Rail Corp.*, 752 F.2d at 55 ("despite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of [Conrail's] day-to-day activities").

In sum, Amtrak functions as Congress intended it to function—as a for-profit corporation without substantial government involvement. It is with good reason, therefore, that this Court and the lower courts—and, until now, the petitioner—have resisted the suggestion that Amtrak is part of the government.

At most, petitioner's arguments establish that the government, by virtue of its relationship with Amtrak, may have the opportunity to attempt to influence Amtrak's business decisions. But that observation only frames the real question in this case: whether the government in fact influenced the particular decision that has been challenged as violating the Constitution. In the final analysis, petitioner's new argument, attempting to characterize Amtrak itself as the government, is nothing more than a desperate effort to avoid confronting that question.

II. THE GOVERNMENT DID NOT INFLUENCE AMTRAK'S DECISION TO REJECT PETITIONER'S POLITICAL AD

A. The "Close Nexus" Test

The question whether the government is responsible for the challenged conduct of a nongovernmental entity can be answered only by examining the nature of the government's involvement in that conduct. "[T]here must be cautious analysis of the quality and degree of Government relationship to the particular acts in question." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 115 (1973). "The complaining party must . . . show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

The requisite "close nexus" has been defined as follows: "Most fundamentally, this Court has held that a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'" *San Francisco Arts*, 483 U.S. at 546 (quoting *Blum*, 457 U.S. at 1004).

This focus on the "close nexus between the State and the challenged action" ensures that regardless of how minimal the government's involvement with the entity, constitutional standards will apply if that involvement caused the alleged deprivation. But it also ensures that regardless of how extensive or detailed the government's involvement with the entity, constitutional standards will not apply if that involvement did not affect the challenged action.[29] Conduct for which the government is truly "*responsible*," *Blum*, 457 U.S. at 1004 (emphasis in original), will be subject to constitutional constraints, but conduct that is not influenced by the government will not. This precise focus, directed at the government's influence on the challenged action, both protects individual rights from government infringement and gives effect to another "great object of the Constitution"—"permit[ting] citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

Petitioner seeks to avoid the "close nexus" analysis by treating it as applicable only to the actions of purely private entities. As demonstrated below, however, the analysis has been applied to entities that are created by the government, that are dependent upon the government for funding, that are extensively regulated by the government,

[29] *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (finding no government action because, "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (finding no government action because, "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination").

and that serve important public interests. Almost by definition, none of those entities was purely private; all were quasi-public and all were subject to varying degrees of government control or influence. In each case, however, the dispositive question was whether the government had exercised control or influence, overtly or covertly, over the particular action that was challenged.

In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), for example, the Court declined to find a close nexus between the State and the employment termination decisions of a school that contracted with the State to provide special education services to public school students. The school served an important "public function" by providing services that the State was required by statute to make available to students with special needs. 457 U.S. at 842; *see id.* at 831 n.1. The school was extensively regulated and heavily dependent on a variety of public funding arrangements: public funds accounted for at least 90%, and in one year 99%, of the school's operating budget. *Id.* at 832, 840-41. The State had even become involved to a limited degree in the school's employment decisions. The discharged vocational counselor had been hired under a federal grant distributed through the State Committee on Criminal Justice, and as a condition of the grant the State Committee had to approve the school's initial hiring decision. When the counselor was fired, she complained to the State Committee, which asked the school to provide a written explanation. The State Committee later said that it was satisfied with the explanation and told the counselor that although it had no authority to order a hearing on her termination, it "would refuse to approve the hiring of another counselor if the school disregarded its agreement to apply its new grievance procedure in her case." *Id.* at 834.

Notwithstanding these facts, which showed extensive involvement of the State generally in the affairs of the school, the Court found government action lacking in the case, because the government had neither coerced nor encouraged the particular decisions at issue:

> Here the decisions to discharge the petitioners *were not compelled or even influenced* by any state regulation. Indeed, *in contrast to the extensive regulation of the school generally*, the various regulators showed relatively little interest in the school's personnel matters. *Id.* at 841 (emphasis added).

Likewise, in *Blum v. Yaretsky, supra*, the Court applied the "close nexus" test to hold that the State was not responsible for decisions to transfer Medicaid patients from their nursing homes. Again, the nursing homes were "extensively regulated," they performed an important public function in carrying out the State's Medicaid program, and they received substantial government subsidies of their operating and capital costs. 457 U.S. at 1004, 1011. But those facts did not eliminate or alter the requirement of a close nexus between the government and the challenged transfer decisions. Nor was that requirement met by proof that "the State was indirectly involved in the transfer decisions," in the sense that it "encouraged the nursing homes to transfer patients to less expensive facilities when appropriate." *Rendell-Baker*, 457 U.S. at 841. This "indirect involve[ment]" and "encourage[ment]" were insufficient to make the government "*responsible*" for the particular transfer decisions at issue, because the State had not " 'affirmatively command[ed]' the summary discharge or transfer of Medicaid patients," it had not established the standards by which the nursing homes' decisions were made, and the decisions were neither made nor reviewed by the government. *Blum*, 457 U.S. at 1005, 1008, 1010 (emphasis in original).

The Court undertook the same "close nexus" analysis —and again found government action lacking—in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra*. In that case, the plaintiff argued that the USOC had violated the Fifth Amendment by discriminating in the enforcement of its right, conferred by Congress, to exclusive use of the word "Olympic." The USOC was hardly a purely private entity. It was created by Congress to "serve a national interest"—by " 'correct-

[ing] the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States,' " and by " 'represent[ing] this Nation to the world community.' " 483 U.S. at 544, 545 n.27 (citations omitted). Congress "gave the USOC authority and responsibilities that no private organization in this country had ever held." *Id.* at 557 (Brennan, J., dissenting). Of particular significance to the case, Congress provided for funding of the USOC not only by authorizing direct grants, but also by conferring the right to exclusive use of the Olympic word and symbol. *Id.* at 543.

The Court held, however, that the Constitution did not restrict the USOC's choice of how to enforce the exclusive right conferred by Congress, because there was "no evidence that the Federal Government *coerced or encouraged* the USOC in the exercise of its right." *Id.* at 547 (emphasis added). "Absent proof of this type of '*close nexus between the* [*Government*] *and the challenged action of the* [*USOC*],' " the Court held, "the challenged action may not be 'fairly treated as that of the [Government] itself.' " *Id.* at 547 n.29 (emphasis added) (citation omitted).[30]

As these cases demonstrate, the "close nexus" standard is the appropriate standard to be applied when the argument is advanced, as it is in this case, that government involvement renders the actions of a corporation—even a corporation with a quasi-public character—government action subject to the constraints of the Constitution.

[30] The Court also noted that there was no evidence that the government "*can* or does exert influence over the exercise of the USOC's enforcement decisions." *Id.* (emphasis added). But that factual observation should not be understood to mean that the mere *potential* for influence is enough to support a finding of government action. What is required is proof that the government "has exercised coercive power or has provided . . . significant encouragement, either overt or covert . . . ." *Id.* at 546. In any event, it is true here, as it was in *San Francisco Arts*, that "neither [the President] nor Congress could control the [entity's] actions directly." *Id.* at 546 n.27.

B. Petitioner Cannot Establish a Close Nexus Between the Government and the Challenged Action

Under the "close nexus" standard, neither Amtrak's prohibition against political advertising in general nor its decision to reject petitioner's political ad in particular can fairly be attributed to the United States government. No federal regulation compelled or influenced these decisions: there are no federal regulations applicable to Amtrak's advertising. No federal official or entity "exercised coercive power" or provided "significant encouragement" in the formulation of Amtrak's policy against political advertising or in the application of that policy to petitioner's ad. The decision to reject petitioner's ad was made for purely commercial reasons by the Amtrak employee responsible for the company's real estate operations. The federal government played no role whatsoever, overt or covert, in that decision.

Petitioner contends that a sufficient nexus exists between the United States and the decision to reject his advertorial because Amtrak's board of directors, which is largely appointed by the President or the Secretary of Transportation, is "responsible for the very rule of decision that [he] challenges." Br. Pet. 39. That argument is wrong for the simple reason that Amtrak's board of directors is not the United States. Only one of Amtrak's board members is a federal official. And as this Court found with respect to Conrail's board in the *Regional Rail Reorganization Act Cases, supra*, the responsibilities of Amtrak's federally appointed directors are no different from those of the directors of any other corporation—"to operate [Amtrak] at a profit for the benefit of the shareholders." 419 U.S. at 152. The decisions of Amtrak's board of directors are not the decisions of the federal government. It therefore adds nothing to petitioner's argument to suggest that this was a board policy, as opposed to a company policy.

If, however, it were considered relevant to know the degree to which the board participated in the formulation or implementation of Amtrak's policy against political

advertising, the answer is: not at all. The policy originated with Amtrak's predecessor, the Pennsylvania Railroad Company (an emphatically private, although unprofitable, entity), years before Amtrak existed. JA 326. Amtrak's officers and employees simply continued this prudent business practice, without board involvement, when Amtrak assumed ownership of Penn Station.

The board of directors did not make the decision to reject petitioner's advertorial. Amtrak's policy prohibiting political advertising is applied by the Vice President of its Real Estate and Operations Development Department, Anthony DeAngelo. He made the decision to reject petitioner's ad, without consulting Amtrak's board. JA 35-36, 122-24; C.A. App. 355-56, 365, 373-74; Pet. App. 5a.

Petitioner no longer argues, as he did in support of his petition for certiorari, that "the record demonstrates that Amtrak's Presidentially-appointed Board explicitly adopted the policy against political advertising." Reply Mem. 3. Instead, he now contends that the board must have known about—and acquiesced in—the policy against political advertising, because it is "reflected in several contracts between Amtrak and its advertising leasing agent, each of which had to be approved by the Board." Br. Pet. 35. Notably, however, petitioner fails to identify a single contract containing the policy that was approved by the board.

The record demonstrates only that Amtrak's board of directors authorized a single agreement, in 1991, between the corporation and TDI, a leasing company. As petitioner correctly noted in the district court, however, "the 1991 Agreement . . . contained no reference to political advertising." JA 171 (Plaintiff's Pre-Trial Proposed Findings of Fact, ¶ 71). The 1991 contract provided simply that advertising material "shall be subject to approval by Amtrak." JA 204. And there is no evidence that the board even reviewed and approved that language. Amtrak's board minutes concerning the 1991 agreement reveal that the board prospectively "authorized [Anthony DeAngelo] to execute any and all documents on behalf of

the Corporation" necessary to grant licenses to TDI. JA 402.[31] Amtrak and TDI did not execute such an agreement until more than a month later. JA 219. Thus, the record shows only that the board prospectively authorized the 1991 contract, which it never saw, and which did not contain any reference to the challenged policy.

Petitioner argues that the board must also have authorized a 1980 leasing agreement between Amtrak and TDI, which contained a provision reserving Amtrak's right to reject "political" advertising. JA 261. There is no evidence, however, that the board reviewed or approved either this language or the 1980 agreement as a whole. Petitioner contends that "[w]hile discovery did not include Board minutes back to 1980," the board authorized the 1991 agreement and, "under the presumption of regularity, is presumed to have acted similarly with respect to the 1980 contract." Br. Pet. 35 n.50. It is important to note, however, that discovery did not "include" the 1980 minutes because petitioner never requested them,[32] and the evidentiary record does not include those minutes because petitioner never argued that the board approved the policy against political advertising, much less the 1980 agreement.[33] Having failed to create a record that sup-

[31] As Anthony DeAngelo explained, such

> contracts are approved by me. What I do is go to the board with a—let's say it is a lease of a piece of property along a right of way. I will tell them that we intend to lease the property under certain conditions and they will approve that, *but they will never see the contract or any of the details of the contract.* JA 25 (emphasis added).

[32] *See* JA 585 (requesting production of "[c]opies of the minutes of the Board of Directors or Board committee meetings at which Amtrak's advertising policy or any Amtrak/TDI contract was considered, *back through and including 1985*") (emphasis added). Amtrak fully complied with petitioner's discovery request. *See* JA 589.

[33] Petitioner's argument below was not that board approval of the policy against political advertising constituted government action. Rather, petitioner argued, on the merits, the inconsistent position that there was no policy against political advertising adopted by anyone. *See, e.g.*, C.A. App. 1319 (Plaintiff's Pre-Trial

ports his arguments in this Court (arguments that he did not make to the courts below), petitioner should not be permitted to offer unsubstantiated arguments about what the record might have shown.[34]

Even if, however, the board were "presumed to have acted similarly with respect to the 1980 contract," as petitioner now argues, the board's procedure in 1991, which was perfectly "regular," was to give advance authorization to an agreement based on its general scope, without ever seeing the subsequent contract or learning its details. A presumption that the board acted similarly in 1980 would not establish that Amtrak's board approved, or even knew about, the policy prohibiting political advertising.

We present this somewhat lengthy discussion of the record to respond to petitioner's ever-changing arguments concerning the board's role. The principal point, however, is that Amtrak's board of directors is not, any more than Amtrak itself, the government, and that a nexus between the board and the policy at issue does not establish government action.

Petitioner also argues that a sufficiently close nexus exists between the United States and the conduct he challenges because Congress's "mandate that Amtrak . . . maximize revenue" "encouraged" the decision to reject his advertorial. Br. Pet. 39. That argument—which is reminiscent of an argument rejected in *Blum*, *see* p. 35, *supra*—proves too much. Virtually *all* of Amtrak's activities are directed toward "maximiz[ing] revenue." That

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Proposed Conclusions of Law, ¶ 43 ("Nothing in TDI's contract with Mr. Lebron states that advertising will be rejected if deemed political. Nor does anything in Amtrak's multiple agreements with TDI so provide.")); Brief for Michael A. Lebron in the Court of Appeals, at 35 ("As far as the record demonstrates, this 'policy' exists only in DeAngelo's mind."); *id.* at 42 (Amtrak's policy "frankly appears to have been created for this case:").

[34] It is only because the 1980 board minutes are not part of the record that we do not discuss them. If petitioner had argued below that board approval of the 1980 contract was at all relevant, Amtrak would have gladly offered the minutes into evidence.

fact does not transform all of the corporation's business decisions into government actions. The government did not instruct or encourage Amtrak to maximize revenue by rejecting paid political ads.

In sum, no "close nexus" exists between the United States government and Amtrak's decision to reject petitioner's advertorial. Amtrak's decisions to disassociate itself from political advertising in general and to reject petitioner's political attack ad in particular were prudent corporate decisions made by the operators of a commercial railroad in the exercise of their business discretion. Those decisions were not the product of government coercion, encouragement, or influence.

III. THE GOVERNMENT'S INACTION IN THIS CASE DOES NOT AMOUNT TO GOVERNMENT ACTION

Petitioner argues that even if Amtrak is not a government entity, and even if the United States did not coerce, encourage or influence Amtrak's decision to reject his political ad, the government's relationship with Amtrak is such that it bears responsibility for that decision nevertheless—in effect, that under the circumstances the federal government's *inaction* amounts to government action. For this argument, petitioner relies upon this Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). But *Burton* does not support any such argument in this case.

In *Burton*, this Court held that the Fourteenth Amendment prohibited the exclusion of black persons from a restaurant that leased space in a public building. The building was built, owned and maintained by the State, and was used primarily to house a public parking garage. The Court noted that "the commercially leased areas . . . constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit"—and that "profits earned by discrimination [in the restaurant] not only contribute to, but also are indispensable elements in, the

financial success of a government agency." 365 U.S. at 723-24. Against that factual background, the Court found "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.*

The Court explained that "*no State may effectively abdicate its responsibilities*" to avoid the "grave injustice" of excluding blacks from a "public building"—"either by ignoring [those responsibilities] or by merely failing to discharge them whatever the motive may be." *Id.* at 724-25 (emphasis added). The State Parking Authority, the Court noted, "could have affirmatively required" in the lease that the restaurant ensure access to the public building on a nondiscriminatory basis. "*By its inaction,*" the Court concluded, "*the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.*" *Id.* at 725 (emphasis added).

Recognizing the potentially far-reaching impact of a holding that government inaction is tantamount to government action—or even a holding that the conferral of mutual benefits transforms government inaction into government action—the Court was careful to "[s]pecifically defin[e] the limits" of its holding:

> what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself. *Id.* at 726.

In other words, the government's failure to insist upon a covenant of nondiscrimination violates the Fourteenth Amendment when the lease of public property occurs in a setting in which the leased property is an integral part of a public building devoted to a public service and an indispensable element in the financial success of the government agency that operates the service.

Petitioner argues that the holding in *Burton* should be extended to cover this case—in effect, that government's failure to prevent the challenged action of a nongovernmental entity will always be regarded as government action whenever the government and nongovernmental entity are in a position of interdependence.[35] But *Burton* does not stand for that broad proposition. *Burton* was a case of racial discrimination. Its reasoning was explicitly dependent on the nature of the government's affirmative "responsibilities under the Fourteenth Amendment," and its holding was expressly limited to "the proscriptions of the Fourteenth Amendment." *Id.* at 725, 726.

Even in cases involving racial discrimination, the Court has limited *Burton* to its facts and refused to find government action where the facts were less compelling. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-75 (1972). And it has never extended *Burton*'s inaction, or "abdication," theory outside the context of racial discrimination, as the petitioner proposes.[36]

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[35] For obvious reasons, petitioner has not chosen to articulate his argument as one of government action premised on inaction or abdication of responsibility. But that is precisely what his argument amounts to—a claim that even in the absence of any government influence over the decision at issue, its inaction or acquiescence amounts to government action because of a general symbiotic relationship between Amtrak and the government.

[36] The Court quoted *Burton* in *Edmonson v. Leesville Concrete Co., supra*, but not for the proposition that inaction in the context of a symbiotic relationship amounts to government action. In that case, the Court held that the exercise of peremptory challenges constituted government action because peremptory challenges could not be exercised without "the overt, significant assistance of the court," and because they involved the "performance of a traditional function of the government." 500 U.S. at 624. The Court's citation to *Burton* was in the following context:

> Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the Court "has not only made itself a party to the [biased act], but has elected to place

Thus, in *San Francisco Arts, supra,* the Court explicitly rejected the argument that the government should be viewed as a "joint participant" under *Burton* in decisions by the USOC that were alleged to have been based on sexual orientation, because the plaintiff had "failed to demonstrate that the Federal Government can or does exert any influence over" those decisions. 483 U.S. at 547 n.29. "At most," the Court explained, "the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise '[m]ere approval of or acquiescence in the initiatives' of the USOC. . . . This is not enough to make the USOC's actions those of the Government." *Id.* at 547 (quoting *Blum,* 457 U.S. at 1004-05); *see also Blum,* 457 U.S. at 1010-11 (rejecting "the rather vague generalization," supported by citation to *Burton,* that State's close relationship to nursing homes made it a "joint participant" in their decisions); *Rendell-Baker,* 457 U.S. at 842-43 (declining to apply *Burton*).

There is serious doubt whether *Burton*'s inaction, or "abdication," theory should be extended beyond the equal protection context in which it was articulated. "Inaction" may be a "classic . . . way of 'denying [equal] protection.' "[37] But it is far from clear that inaction can be regarded as violating other constitutional provisions that do not impose affirmative obligations, but rather impose limitations on the government's power to act. *See, e.g., DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 195 (1989) (due process clause is a "limitation on the State's power to act" and imposes no "affirmative obligation" to protect child from abusive father); *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 164-66 (1978) (State's refusal to block sale of bailor's goods not a violation of due process clause).

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its power, property and prestige behind the [alleged] discrimination." *Id.* (quoting *Burton,* 365 U.S. at 725).

Edmonson is thus not a case of government inaction, but of overt government action.

[37] Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14,* 81 Harv. L. Rev. 69, 73 (1967).

Regardless of whether inaction could ever be regarded as violating some other provision of the Constitution, it is clear that the First Amendment "is not as amenable as the Fourteenth Amendment is to the construction that there is state action by inaction." *Edwards v. Habib,* 397 F.2d 687, 693 (D.C. Cir. 1968) (Wright, J.), *cert. denied,* 393 U.S. 1016 (1969).[38] To illustrate that point, one need only consider the facts of *Burton* itself. It seems clear that the Court would not have found government action in *Burton* if the Eagle Coffee Shoppe had declined to lease space above its lunch counter to display a political ad, and if the constitutional challenge had been a First Amendment one. The reason for the different result in such a case is not that the First Amendment is somehow less important than the Fourteenth Amendment's equal protection guarantee. The reason is that these constitutional rights are implicated in different ways in the two cases, and the government's role in protecting these constitutional rights is fundamentally different.

If the Eagle Coffee Shoppe had reserved its walls for speech of its own choosing, it would have been exercising its free-speech right, and the First Amendment would have protected its exercise of that right from government interference. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. 1, 9 (1986); *Wooley v. Maynard,* 430 U.S. 705, 713 (1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). But the Eagle Coffee Shoppe had no constitutional right to discriminate, and the Constitution did not protect its discrimination from government interference.[39] To the

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[38] *See also Powe v. Miles,* 407 F.2d 73, 81 (2d Cir. 1968) (Friendly, J.) (holding that "state inaction" in failing to oversee university's demonstration guidelines is not subject to First Amendment attack, but noting that inaction in the face of discriminatory admission policies would present a "different question").

[39] "[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination. . . . Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never

contrary, because racial discrimination is regarded as a singular evil, the government's inaction could be regarded, under the circumstances in *Burton*, as an "abdicat[ion]" of its affirmative "responsibilities under the Fourteenth Amendment" to ensure equal protection of the laws. 365 U.S. at 725.[40]

It is entirely sensible to say that under some circumstances the Fourteenth Amendment's equal *protection* guarantee obligates the government to *protect* its citizens from racial discrimination by its tenants on its property,[41] but the First Amendment neither obligates nor permits

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been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973).

[40] The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring and dissenting).

Precisely for these reasons, at least five Circuits have explicitly recognized that state action may be found more readily when the challenged action involves racial discrimination. *See, e.g., Parks v. "Mr. Ford,"* 556 F.2d 132, 137 (3d Cir. 1977); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1114 n.6 (9th Cir. 1975); *Greenya v. George Washington University*, 512 F.2d 556, 560 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 931 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Powe v. Miles, supra.*

[41] "[T]he Reconstruction Amendments were enacted with a particular purpose in mind: to eradicate forever the vestiges of slavery and the black codes." *Edwards v. Habib*, 397 F.2d at 693.

the government to police its tenants' speech. In fact, the notion of the government's "abdicating" such a "responsibility" is wholly foreign to our First Amendment discourse. We do not speak, in this country, of the government's having, and then abdicating, a responsibility to police the speech of nongovernmental entities.

And so, it *is* relevant in this case that the decision under attack is not a decision to engage in racial discrimination, but a decision by a nongovernmental entity to limit the speech on its premises to commercial speech. The government has no obligation to interfere with such a decision, but rather an obligation to leave such a decision alone. And its inaction in the face of such a decision does not even potentially violate the First Amendment; it vindicates the command of the First Amendment that government shall not interfere with freedom of speech.

Thus, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), this Court held that a broadcaster's refusal to accept editorial advertisements was not government action for purposes of First Amendment analysis, notwithstanding the fact that the broadcaster was operating pursuant to a government license as a "public trustee" subject to the oversight of the Federal Communications Commission. *Id.* at 118. It was dispositive that "the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion." *Id.* Like the government in this case, it "merely permitted or failed to prohibit such acts." *Id.* at 119. In the First Amendment area, such inaction does not constitute government action subject to constitutional attack.[42]

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[42] None of the cases cited by the petitioner is inconsistent with this analysis. The four cases that explicitly reject or question differential state action standards did not involve First Amendment claims. Only three of the cases that petitioner claims implicitly reject a differential standard involved First Amendment claims—*Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); and

In sum, the government does not have a constitutional responsibility to police all of the actions of an entity with which it has a "symbiotic" or other close relationship, and the existence of such a relationship does not automatically transform all of the nongovernmental entity's actions into government action. Even petitioner acknowledges at the outset of his argument that the existence of a symbiotic relationship cannot support a finding of government action "for all purposes," but only for "specific conduct." Br. Pet. 18; *see also id.* 31. But petitioner offers no standard that can be used to determine which specific conduct should be attributed to the government. The only standard that might be gleaned from petitioner's brief is whether the decision at issue had financial consequences to the nongovernmental entity and, indirectly, to the government. But that standard would have resulted in a finding of government action in *Blum*, where the state benefited from the transfer decisions at issue. *See* p. 35, *supra*. It would have resulted in a determination in *Burton* that all of the Eagle Coffee Shoppe's business decisions were subject to constitutional attack. And, contrary to petitioner's acknowledgment at the outset of his argument, it would (assuming the existence of a "symbiotic relationship") subject all of Amtrak's business decisions to constitutional scrutiny. *Compare* Br. Pet. 18 (noting that "symbiotic relationship" theory would be limited to "specific conduct") *with* Br. Pet. 39 n.53 (noting that all employment decisions, and therefore presumably all business decisions, would be covered by the theory).

Burton itself suggests a more limited test of government responsibility—whether under the particular circumstances, the constitutional provision that is invoked can be said to impose an affirmative duty to act, such that inaction can be deemed an abdication of a constitutional duty. That was true in *Burton*, and it is not true here.

Krynicky v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985)—and those claims were fundamentally different from the claim in this case. In those cases, the plaintiffs alleged that their firings were in retaliation for their speech. Unlike Amtrak in this case, the employers could claim no speech-related interest; they in fact denied that speech had anything to do with their decisions. Thus, the First Amendment did not even arguably protect the challenged conduct in those cases from government interference.

IV. THE COURT SHOULD DISREGARD PETITIONER'S PARADE OF HORRIBLES

Petitioner presents a parade of horribles that he says could ensue if Amtrak's advertising policies are not subjected to First Amendment scrutiny as if they were the government's. But petitioner's imagination should not distort the analysis of the constitutional issue in this case. As Justice Frankfurter once cautioned, "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world . . . ." *New York v. United States*, 326 U.S. 572, 582 (1946).

Petitioner suggests that if Amtrak is not treated as the government, it could discriminate against certain viewpoints in the leasing of advertising space—offering, for example, to sell space only to the incumbent during a Presidential campaign. That suggestion is indeed ironic, for the policy under attack here is to avoid such controversies by refraining from leasing advertising space in Penn Station for any political message. If, however, Amtrak were to reverse its long-standing and sound business policy against political advertising, and then yield to government coercion or influence, the courts could discern this and find government action under a "close nexus" theory. But absent such coercion or influence, there would be no reason to invoke the Constitution.[43]

Petitioner also offers the preposterous suggestion that if Amtrak is freed from constitutional scrutiny, it could discriminate on the basis of race, gender or religion. But rejection of petitioner's claim here would not necessarily preclude a finding of government action on a *Burton*

[43] If the concern is that government funds might be misused for purposes other than those for which they were intended, Congress is not powerless to act. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991).

"abdication" theory if, for example, Amtrak were to start segregating its trains. Nor, of course, could Amtrak engage in such conduct without violating federal and state civil rights statutes.

This case should not be decided based on imagined fears of the consequences of extending to Amtrak the same freedoms that are enjoyed by its competitors—most notably, the airlines, which also receive substantial government assistance.[44] Amtrak could just as easily cite its concern that a decision subjecting its advertising policies to First Amendment scrutiny may result in a challenge to its policy against leasing ad space to its competitors. But the issue in this case neither requires nor warrants a weighing of such fears and concerns. The issue is a straightforward one: whether the government is truly "*responsible*" for Amtrak's policy against political advertising. *Blum*, 457 U.S. at 1005 (emphasis in original). The record shows that it is not.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

Of Counsel:
STEPHEN C. ROGERS
RICHARD G. SLATTERY
NATIONAL RAILROAD
PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

LOUIS R. COHEN
2445 M Street, N.W.
Washington, D.C. 20037
WILMER, CUTLER & PICKERING

September 8, 1994

KEVIN T. BAINE
Counsel of Record
NICOLE K. SELIGMAN
STEVEN M. FARINA
STEPHEN D. SENCER
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Attorneys for Respondent
National Railroad
Passenger Corporation
(Amtrak)

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[44] *See* note 26, *supra*.

APPENDIX

After a hard week's work, you're ready for the right place with the right one. Why make the right moment the right's moment? Coors Light not only has the taste that won't slow you down. It's the Silver Bullet that aims the Far Right's political agenda at the heart of America. Want the awesome facts? Then read between these lines.

Every year, the Coors family, owners of Coors Brewing Co., gives financial support to groups like The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. They form part of a network that includes authoritarian religious and political extremists. When you buy Coors products, you help them turn back civil rights, censure [sic] high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs. Did you know Joe Coors himself bought an aircraft for the Nicaraguan contras?

Where are the Nicaraguan contras today? El Loco says "Once, we were glad to have Joe Coors and his friends on our side. Together, we fought the hard and dirty fight that drove Nicaraguans to the voting booth to make The Right's Choice for a Better Nicaragua! Now the shooting war is over; after 30,000 dead, I can walk into my favorite Managua bar and say, 'No more of that industrial strength Nicaraguan cervesa for me. Gimme the great taste of Coors Light!' But my family, and Nicaraguan families everywhere, are poorer than ever. With 55% unemployed, we scour garbage heaps for food in the villages we ravaged. What happened to all that promised U.S. aid? What does it really mean to say that Coors Light is The Right's Beer now?"

E 2210-18 (footnotes omitted).